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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 457

GUS KOTTEAKOS AND MICHAEL LEKACOS,
Petitioners,

vs.

THE UNITED STATES OF AMERICA

No. 458

NATHAN REGENBOGEN,
Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF PETITIONERS

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BRIEF ON BEHALF OF THE PETITIONERS

Preliminary Statement

The cause comes before the Court upon a writ of certiorari allowed by this Court on November 13, 1945 (United States Supreme Court Law. Ed. Advance Opinions, Volume 90,

No. 2, Page 102), to review a judgment of the Circuit Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Eastern District of New York, convicting the petitioners of the crime of conspiracy to make fraudulent applications for loans under the National Housing Act contrary to sections 1702, 1703, 1715 and 1731 of Title 12, U. S. Code and Section 88 of Title 18, U. S. Code (1305).[1]

In the Circuit Court of Appeals, petitioners Kotteakos and Lekacos appealed on a single typewritten transcript of the record. Petitioner Regenbogen's appeal was heard on the printed record. The appeals of all three petitioners were argued at the same time and the Circuit Court rendered only one opinion, although two separate judgments were entered, one affirming the conviction of Kotteakos and Lekacos and the other affirming the conviction of Regenbogen (1300, 1301).

There was no opinion in the District Court. The opinion of the Circuit Court of Appeals for the Second Circuit, is reported at 151 F. 2d 170, and is printed at pages 1294 to 1300 of the record. Denial of rehearing was without opinion.

STATEMENT OF CASE

Introductory Statement of Matter Involved

The indictment (2-16) charges a conspiracy to violate Title 12, U. S. Code, Sections 1702, 1703, 1715, 1731, in that the petitioners and others indicted with them agreed to obtain loans under Title 1, of the National Housing Act upon false and fraudulent representations made in applica-

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[1] Numeral references, unless otherwise stated, are to the pages in the printed Regenbogen record upon which this Court has consented to hear both writs of certiorari by its order dated December 17, 1945.

tions for such loans. The indictment alleges thirty-five overt acts (8-16), of which overt acts numbers 11, 12, 15, 16, 17, 18, 19, 20, 21 and 22 deal with matters alleged to involve one or more of these petitioners.

Thirty-two persons were named as defendants in the indictment. Four were named as co-conspirators but not indicted. Fifteen of the defendants were tried after the others had been eliminated by pleas of guilty or severance. Of the seventeen tried, seven were convicted, including the three petitioners. Three were acquitted at the close of the Government's case by order of the Trial Court. Two were acquitted by the jury. A mistrial was declared as to one, and the jury disagreed as to the remaining four (1285-6).[2]

The Circuit Court held that the indictment's allegation of the existence of a single conspiracy could not be supported by the evidence (1296, 1297), and that the proof showed the existence of at least "eight and perhaps more" separate conspiracies (1295).[3]

As set forth in the opinion of the Circuit Court, the Government's principal witness, Simon Brown, acted as a broker for borrowers seeking to obtain loans under the National Housing Act, and the eight or more conspiracies noted by the Court consisted of the separate dealings of eight or more independent groups, each of which utilized the services of Brown in obtaining loans (1295), in which the other groups had no interest (1297).

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[2] Each of the petitioners was sentenced to serve a term of one year and three months without costs. Bail was fixed pending appeal, which bail is still in effect (24).

[3] The Solicitor-General, in his Brief for the United States in opposition to the applications for Certiorari, agrees with the Circuit Court that a multiplicity of conspiracies were disclosed by the evidence (p. 9 et seq. of Solicitor-Generals Brief).

Upon the trial, evidence of dealings between Brown and defendants other than the petitioners was admitted against the petitioners. The Trial Court's ruling on this evidence was held by the Circuit Court to have been erroneous (1295-1296). The Circuit Court stated that the Trial Court's charge was "plainly wrong" (1296) when it instructed the jury that the "indictment charges but one conspiracy, and to convict each of the defendants of a conspiracy the Government would have to prove, and you would have to find, that each of the defendants was a member of that conspiracy. 'You cannot divide it up. It is one conspiracy, and the question is whether or not each of the defendants, or which of the defendants, are members of that conspiracy" (1296, 1245).

The Circuit Court took occasion to observe that the Trial Court was "apparently misled by an erroneous understanding of the rule that, when anyone joins an existing conspiracy, he takes it over as it is, and becomes a party to it in its earlier phases, and that the declarations of other conspirators, even though made before he has entered, are competent against him" (1296). The Circuit Court further held that the Trial Judge was "plainly wrong in supposing that upon the evidence there could be a single conspiracy; and in the view which he took of the law, he should have dismissed the indictment" (1296), and that even though petitioners knew that Brown was acting as a broker for the other defendants who were making similar false representations to the bank, such fact was not enough to "make them [the petitioners] confederates with the other applicants; it did not give them, [the petitioners,] any interest in the success of any loans but their own; there was no interest, no venture, common to them and anyone else but Brown himself" (1297).

Thus, the Trial Court's admitted erroneous holding that there was only one conspiracy even though the record established at least "eight, or perhaps more," taken in connection with the charge that the acts and declarations of one conspirator bound all, that indeed only one overt act was needed to vitalize this envisaged single conspiracy (1250), produced the unconscionable situation whereby these petitioners might have been found guilty by the jury upon proof of the commission of an overt act by another defendant in one of the other seven or more separate conspiracies.

Viewed from another perspective, equally prejudicial to all concepts of fair trial, the jury was thus invited to find the petitioners guilty upon evidence which did not constitute legal proof of their guilt. Still another aspect of the same situation is that the case was submitted to the jury on the theory of a single conspiracy which was not proven. Thus the petitioners were denied their indefeasible right to a fair, just and impartial trial and verdict.

Moreover, as we shall later demonstrate, the evidence concerning acts and declarations in conspiracies in which these petitioners had no interest was of such character and was submitted to the jury in such fashion as to predispose the jury to connect these petitioners with the other conspiracies. In this way, petitioners were deeply stained and impugned by testimony which the Circuit Court has held was legally inadmissible against them.

The question is, therefore, squarely presented whether convictions obtained under the aegis of a charge which authorized the conviction of petitioners upon proof of the commission of other crimes by other persons; and upon evidence which did not constitute proof of guilt, and upon a theory of facts not in evidence—whether such convictions must not be rejected out of regard for considerations which attain the constitutional level.

Summary of Pertinent Facts

The testimony of Simon Brown, co-defendant who pleaded guilty to the indictment (356) constitutes the matrix of the case. Brown's testimony (356-664) consists, essentially, of a narration of his career as a F. H. A. loan broker, in which the long list of co-defendants appear as clients or groups of clients who were willing to comply with Brown's illicit suggestions and hence shared his guilt in the individual transactions in which they happened to figure.

The testimony of Brown discloses a number of groupings of agreements and transactions each unrelated to the other. Taking each transaction in the order in which they were introduced by Brown, we find (1) that defendant Secular had made arrangements with Brown for about two dozen loans (360) and that the persons in whose behalf the applications for loans were to be made were "business people, in business, and they needed the money, in fact on a lot of the loans he was sure the people did not even own the property" (361). Secular brought the applications to Brown, who handled their negotiation through the Franklin Square National Bank (359). Secular paid a commission of 5% to Brown (360); (2) defendants Joseph Harris and Emanuel Harris applied through Brown for similar loans through the Franklin Square National Bank, not for the purpose of using the proceeds for modernization, but to "pay creditors with it" (363-4); (3) Brown negotiated the Posner, Dworkin and Weissman loans through the same bank, Dworkin having informed Brown that the money was to be used to make "a settlement with his creditors" (370), and that although the loans were obtained on the theory of a modernization loan, they were really put through for the purpose of deceiving the bank and using the money to pay creditors (371-2); (4) Brown testified concerning loans he obtained for petitioner Lekacos, whom he said he met at the "Federal Cafe-

teria" and to whom he was introduced by Mae Seklir (387-388). The first loan was to enable Lekacos to obtain funds to open a law office (388). The second involved the obtaining of a loan in the names of Theodore Lekacos and Clara Lekacos, petitioner's brother and sister-in-law. A first mortgage was presented to the bank and the check for the loan was mailed to petitioner Lekacos. The check was endorsed by petitioner and when petitioner's right to use his brother's name was called in question, the brother gave petitioner Lekacos a written power of attorney designed to attest to the fact that petitioner Lekacos was entitled to sign the check (384). Brown further testified concerning his dealings with petitioner Lekacos, and referred to a third loan allegedly forwarded by Lekacos and signed by defendant Gerakeris. Brown testified that Sadie Vendicos impersonated the wife of Gerakeris (393).[4] The jury apparently disbelieved this portion of Brown's testimony, because Mrs. Vendicos was acquitted (1286); (5) Brown next testified concerning his dealings with Mae Seklir and Pearl Seklir, who had originally become acquainted with Brown through David Lapin (396). After the first application for a loan had been made and the money paid, there was a second application made for $1,000 which came directly from Mae Seklir (399-400). Brown also testified that he made a loan for himself in the name of Max Slovin, and that he asked Mae Seklir that if a letter was received from the Peninsular National Bank referring to Max Slovin and inquiring if he was employed by the Lustrite Corporation, that she should affirm that fact. This was done by Mae Seklir, and the loan was approved (402-403). Later on, during the cross-examination, it was discovered that Brown had received $1,000 out of the Seklir loan (536); (6) Another group

[4] Petitioners Regenbogen and Kotteakos are not in any way involved in the above transactions between Brown and Lekacos.

of transactions put through by Brown were the loans he obtained on behalf of Hyman Litvin and Jacob Litvin (416). The Litvins in another instance signed the names of Rubin Smith and Ann Smith upon an application (427). Brown kept $1,000.00 out of a total of $2,500.00 for himself (428); (7) Brown then testified concerning his personal dealings with petitioner Kotteakos. Here a loan was originally obtained for Kotteakos and was promptly followed by a loan made by Kotteakos, the proceeds of which went to Brown for Brown's personal use and benefit;[5] (8) Brown testified concerning a loan made to petitioner Regenbogen, which loan was promptly repaid (453). Brown testified that the application for the Regenbogen loan was mailed to him by Kotteakos. When the loan was approved and Brown went to see Regenbogen, he was told that the money was being returned to the bank forthwith. There was no testimony offered as to who had signed the Regenbogen loan application (452); (9) Brown gave further testimony concerning two loans made in the names of Tierney and Sandes, the proceeds of which loans were said to have been paid to Kotteakos (454, 457). In this connection an abortive attempt was made to connect Regenbogen with the cashing of one of the checks representing the loans. Sandes and Tierney were never identified, and, as far as the record discloses, were non-existent;[6] (10) The Wolf loan, not connected with any of the previous groups (865); (11) other loans were discussed by Brown not linked to any of these groups.

We shall not burden the Court with any detailed recital of the cross-examination of the witness Brown. We shall,

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[5] Lekacos was not involved in the loan obtained by Kotteakos for Brown's personal use and benefit. Regenbogen likewise was not involved in these first two Kotteakos loans.

[6] Petitioner Lekacos was in no way connected with these Brown-Kotteakos-Regenbogen dealings.

however, advert to Brown's testimony with respect to the number of conspiracies in which he said he was engaged during the time covered by the testimony.[7]

There is no doubt that Brown kept each group of persons separate and apart from every other group. On cross-examination, at one point, Brown said

> "Q. So that there are now four separate groups, is that right?
> "A. That is right.
> "Q. Which were kept apart, they had no relationship at all, did they?
> "A. None whatsoever.
> "Q. None at all in the slightest way?
> "A. No" (563).

Brown went on after this point to outline at least seven or eight other transactions, each of which he kept separate from any other transaction (563-5). To use the language of the Circuit Court, the result of Brown's action was that "nothing said by Brown about any of the other groups concerned the three appellants [petitioners]; and in this we include not only the acts which he imputed to the others, but any declarations which he put in their mouths" (1295). We leave for further discussion and analysis the testimony of Brown which we feel deeply stained and generally impugned the petitioners to the point where it gave rise to genuine plausibility to the chance of prejudice. However, it must be remembered that the Trial Court charged the jury that the acts and

[7] The cross-examination of Brown (560-566) fully and completely demonstrates that instead of the single all-inclusive conspiracy charged in the indictment there were instead 10, 11 or more independent and unrelated agreements between Brown and various persons and groups of persons, each of whom had their own reasons and motives for obtaining money by means of loans from banks, and none of which were connected together. See the opinion of the Circuit Court of Appeals on this subject as reported at 1295 of the record.

declarations of any co-conspirator were binding upon every other co-conspirator, including the petitioners (1249) and that the Circuit Court of Appeals said of this instruction, that it was erroneous, in the light of the evidence adduced at the trial (1296).

Questions Presented

1. Did the Circuit Court err in sustaining the conviction of the petitioners upon evidence showing as the Circuit Court found "at least eight, and perhaps more" separate conspiracies, as contrasted with the indictment's allegation of only a single conspiracy, where the Trial Court charged that only the conspiracy alleged had been proved and further charged that the acts and declarations of one conspirator bound all?

2. Where eight or more conspiracies are proved, although only one is charged in the indictment, does not the variance become prejudicial when the Trial Court denies the existence of variance and charges that the acts and declaration of one conspirator binds all?

3. Does not such variance become prejudicial where the Trial Court permits the jury to deal with the multiplicity of conspiracies as a single entity?

4. Does not a judge's charge which has the effect of authorizing a jury to convict a defendant shown to be involved in one conspiracy upon proof of the commission of an overt act in another conspiracy, deny due process of law to the defendant or otherwise constitute such fundamental error as to require reversal?

5. Should a conviction be reversed where the Court's charge authorized a jury to consider evidence of the guilt of others as proof of the guilt of the petitioners, and which

charge further submitted the case to the jury upon a theory of facts not proven?

6. Did the Circuit Court err in reading the judge's charge as leaving to the jury to decide whether or not there was proof of a multiplicity of conspiracies or only a single conspiracy?

7. Does not the quantitative disparity between the one conspiracy charged and the eight or more proved, in itself constitute prejudice?

8. Did the Circuit Court err in holding (a) that the "several conspiracies" could have been joined in one indictment and (b) that several conspiracies with only one member common to all, could be properly joined?

9. Did the Circuit Court err, assuming that such joinder were proper, in holding that the situation created by the variance herein, is the same as though there had been such joinder?

10. Did the Circuit Court err in holding that the testimony of the chief government witness did not tend "even in the slightest way to implicate them [petitioners] in the other frauds or to predispose the jury to connect them with the other applicants," and that the "only possible indirect prejudice that they [petitioners] could have suffered" (1298) because of the Trial Court's erroneous rulings and charge was "in case the Jury would be more ready to accept what he [Brown] said as to his dealings with them because of any testimony as to his dealings with other applicants"? (1298.)

11. Did the Circuit Court err in disregarding these admitted errors of law, both in the admission of evidence and in the charge to the jury, especially since these errors were not technical in nature and did affect the substantial rights of the petitioners?

ARGUMENT

I

The Court below erred in sustaining the judgments of conviction upon an indictment which charged one conspiracy where the proof conclusively showed "Eight, or Perhaps More" conspiracies and where, in submitting the case to the jury, the Trial Court either required or authorized the jury to find that only a single conspiracy existed. (Discussion of questions presented Nos. 1-2-4-5-6-10-11.)

A. *The Indictment*

Article 6 of the Amendments to the Constitution of the United States provides the inflexible rule that in all criminal proceedings the accused must "be informed of the nature and cause of the accusation" made against him.

No one can say that the indictment in this case charges anything other than a single conspiracy embracing 32 defendants and covering acts over a period of approximately three years (2-3). The Circuit Court has held that instead of the single conspiracy charged in the indictment, the proof developed at the trial showed the existence of "eight or perhaps more" separate and distinct conspiracies (1295). It thus appears that before the trial began the petitioners were deprived of their constitutional right to be informed of the "nature and cause of the accusation" made against them. The United States attorney who drew the indictment well knew, or should have known, since Brown was his principal witness, that the indictment was a camouflaged instrument and that in fact, proof at the trial would show not one, but many conspiracies. (*U. S.* v. *Perlstein*, 120 Fed. 2d 276, 283).

B. *The Proof*

During the trial, when various motions were made with respect to the admission of testimony involving persons

other than the petitioners, the error in the drawing of the indictment was carried another step forward by the Court's admission of this testimony, upon the theory that anything done or said by any conspirator named in the indictment was admissible against the petitioners. The Circuit Court stated that the Trial Judge was plainly wrong in this ruling (1296). This was no question of a variance which arose during the trial as a surprise.

"The prosecution however, familiar with the proceedings before the Grand Jury, with the statements of the witnesses, with the exhibits and all the provable facts of its case against each of the defendants must have known * * *" that petitioners were not connected with all these separate conspiracies (*United States* v. *Perlstein*, 120 F. 2d 276, 283). It is axiomatic that an illegal agreement is the gist of the crime of conspiracy (*Pettibone* v. *United States*, 148 U. S. 197, 203; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443). Here there existed not one agreement, but, as the Circuit Court said, "eight, or perhaps more" separate and distinct agreements (1295). When motions to compel an election between the various conspiracies were made, (1044 and 1233) they were denied.

In fact, if the indictment had been fairly drawn, the Trial Judge "would have applied the doctrine of *McElroy* v. *United States*, 164 U. S. 76, and compelled the Government to elect" the conspiracy it desired to have the jury pass upon (*Perlstein* v. *United States*, 120 F. 2d 276, 283).

Thus, from the very inception of the prosecution, whether by accident or design, petitioners were deprived of their basic constitutional rights.

A further study of the record indicates that there was no possibility or hope on the part of the prosecutor to connect all these "eight, or perhaps more" transactions into a single conspiracy. When Brown's cross-examination was ended it was clear that Brown's dealings with the

other seven or eight groups were confined in each instance to a separate group, and that there was no connection whatever between one group and the other. All this the Circuit Court has recognized and stated in its opinion (1295-6-7).

The trial took many weeks. During that time the evidence of Brown's dealings with the other 29 defendants covered many hours and pages of testimony. Every time objection was made upon the ground that this testimony of dealings with others was not binding on petitioners, the objections were overruled upon the theory that since there was only one conspiracy charged, any act or declaration by any defendant was binding on the petitioners.

These rulings the Circuit Court has held as error. Speaking of the Trial Judge on this point, the Circuit Court said (1296-7):

> "He was apparently misled by an erroneous understanding of the rule that, when anyone joins an existing conspiracy, he takes it over as it is, and becomes a party to it in its earlier phases, and that the declarations of other conspirators, even though made before he has entered, are competent against him. What he failed to remember was that to bring this rule into operation it is not enough that, when one joins with another in a criminal venture, he knows that his confederate is engaged in other criminal undertakings with other persons, even though they be of the same general nature. The acts and declarations of confederates, past or future, are never competent against a party except in so far as they are steps in furtherance of a purpose common to him and them. Declarations are no different from other acts; they become competent only when they are uttered in order to accomplish the common purpose. In the case at bar, we assume that Lekacos and Kotteakos and Regenbogen knew that Brown was for the time being acting as a broker for a number of other persons, who were getting loans in fraud of the Act, and who were making false

representations to the bank like those which they themselves were making. But that was not enough to make them confederates with the other applicants; it did not give them any interest in the success of any loans but their own; there was no interest, no venture, common to them and anyone else but Brown himself." (See 1248 for Court's Charge on this subject.)

C. *The Charge*

When all of the evidence was in, and the Trial Court undertook to charge the jury, the error was further intensified. The Trial Court said:

> "Were all of these defendants moved by a *common purpose* to get money by violating the law of the United States, to borrow from the banks, and the United States, who insured the deposits? That is the question" (1248). (Our emphasis.)

Speaking of the conspiracy the Trial Court said:

> "*You cannot divide it up.* It is *one* conspiracy, and the question is whether or not each of the defendants, or which of the defendants, are members of *that* conspiracy" (1245). (Our emphasis.)

At another point in the charge the Trial Court went on to say that:

> "The test is whether or not what they were doing was in furtherance of, and for the purpose of, accomplishing the conspiracy, not that they were successful—get that straight—but whether what they did was done in furtherance of, and for the accomplishment of a *common* purpose" (1248). (Our emphasis.)

However, the error did not stop at this point. The charge went on to say:

> "If you find that there was a conspiracy and that any of these defendants were members of that conspiracy,

then the acts or statements of any of those whom you so find to be conspirators between the two dates that I have mentioned, may be considered by you in evidence as against all of the defendants whom you so find to be members of the conspiracy" (1249).

The Court stated further:

"But in order to vitalize the conspiracy at least one overt act must be proven, because the one overt act is the allegation of the doing of something in furtherance of the conspiracy, and that vitalizes it, and from that time on everybody who was a member of the conspiracy and had not openly disavowed and withdrawn from it would be a conspirator. The crime would be vitalized" (1250).

Now the picture was complete as far as the jury was concerned. The Court had ruled, as a matter of law, that there was one conspiracy. Evidence of what any defendant in the case had said or done was admissible against the petitioners. And the petitioners were bound by the acts and declarations of any defendant whom the jury might believe to be guilty of crime. One overt act would vitalize the conspiracy.

At this point we pause to say that a number of defendants pleaded guilty before the trial, others were found guilty, and in each instance, under the Court's ruling, whatever these persons may have said and done in connection with their own illegal transactions with Brown, was to be binding on petitioners.

It is fundamental that no one can be convicted of any crime other than the one for which he stands indicted. Either that crime is proven, or none at all. We urge that when a Judge's charge in effect instructs the jury that they are at liberty to convict a defendant charged with one conspiracy on the basis of proof of crimes or conspiracies committed by other persons, that such charge constitutes

fundamental error and is without doubt flagrantly at odds with our basic concepts of criminal jurisprudence, and must not be permitted to stand.

The force and effect of the instructions that there was only one conspiracy, that the acts and declarations of any conspirator may be considered against all, that only one overt act was necessary to vitalize the single conspiracy envisaged by the Trial Court, was not dissipated elsewhere in the charge. The sequence of questions put to the jury (1253) such as "what was the relation between the several defendants? Did defendants Michael Lekacos, Louis Levine, Gus Kotteakos, Max J. Posner, James Secular, Nathan Regenbogen, bring applicants or applications from any of these defendants to Brown? Were any of these men acquainted with each other?"—these questions must be deemed to have been propounded for the purpose of guiding the jury in its quest for the single overt act which would vitalize the conspiracy and make the acts and declarations of one bind all.

D. *Overt Act*

Another point which stands out in bold relief is the necessity of proving an overt act in order to vitalize a conspiracy, under Section 88, Title 18 U. S. Code. On this subject the Court charged the jury that "at least *one* overt act must be proven" (1250). Not *one* overt act in the conspiracies in which the Circuit Court said the proof showed petitioners might have been involved, but *one* overt act in any of the conspiracies, the "eight, or perhaps more" conspiracies said by the Circuit Court to have existed in the proof in the case. Under these circumstances, the question is squarely presented to this Court whether under a charge permitting proof of one overt act in the non-existent conspiracy, a conviction may be sustained against these three petitioners.

Of course it is true that the Trial Judge instructed the

jury that if they should find that any defendant was not a member of the conspiracy, that would "be the end of it as far as that one was concerned" (1249). This admonition in no way removed the possibility that the jury used the evidence of acts and declarations by defendants in other conspiracies as the means for establishing either the single overt act which the Court required them to find, or the connection of each of the petitioners with the conspiracy.

In *Nash* v. *United States*, 229 U. S. 373, 379, 380, this Court dealt with an analogous situation created by reason of an erroneous charge by the Trial Court in a case involving a conspiracy to violate the Sherman Act.

In the *Nash* case (*supra*), "the court in its instructions told the jury to 'consider the evidence of the means which it is insisted by the prosecution tends to show a conspiracy' and said: 'You will consider carefully all the means which the indictment charges' and 'It is sufficient if it be shown beyond a reasonable doubt that some of these means charged were a part of the common scheme, design or understanding, or conspiracy by two or more of the defendants, and that these same means were of themselves sufficient to cause an essential obstruction and restraint of the free and untrammelled flow of trade and commerce between the States and foreign nations' " (p. 379-380).

This instruction was valid enough in the abstract. However, this Court in appraising the means charged as part of the conspiracy found that one of them, namely, "false raising of grades and false gauging", under the circumstances of the state of the proof, showed only cheating, and could not support the conspiracy alleged. This Court held that the trial court's instructions constituted reversible error in that "the charge invited the jury to consider all [the means] and permitted a verdict upon any of them," including the acts wrongly categorized as means (p. 380).

This Court held further that it was unnecessary for it to deliberate whether the evidence as to valid means of conspiracy warranted the conviction, since this question did not affect the Court's conclusion, and the absence of such evidence would only add another reason for holding the instructions erroneous.

The parallel between the *Nash* case and our case seems clear and certain. In our case the Trial Court instructed the jury that a verdict of guilty (a finding of conspiracy) could be predicated upon proof of overt act in any conspiracy, which was, in effect, saying that the jury in our case could use all the "means" to establish guilt. Certainly, if there were no overt act found by the jury in each of the three, four or more conspiracies in which these petitioners are involved, then no finding of guilt could be made. It thus remains open and entirely undetermined whether the jury's verdict as to each of the petitioners was based upon a valid finding of an overt act committed by each of them in the several conspiracies in which they were involved, or whether the verdict rested upon some other overt act entirely. Upon the same reasoning that this Court reversed the *Nash* case, *supra*, this case should likewise be reversed.

Moreover, our case was submitted to the jury as a single conspiracy. This was a theory of the case which the Circuit Court has said was not supported by the evidence, to which the Solicitor General adds his approval. "That it is reversible error to submit to the jury the question whether the conspiracy in question includes means of which there is no evidence follows from the decision in *Nash* v. *United States*, 229 U. S. 373." (*Patterson* v. *United States*, 6th Cir., 222 F. 599, 650.)

The Court of Appeals of the State of New York condemned a charge which "suggested to the jury, and sub-

mitted for their consideration, a theory of the facts, which had no foundation in the evidence as it appears in the record" (*People* v. *Barberi*, 149 N. Y. 256, 274). This Court, in *United States* v. *Breitling*, 20 Howard, 252, 254-5, said "It is clearly error in a Court to charge a jury upon a supposed or conjectural state of facts on which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the Court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It might induce them to indulge in conjectures, instead of weighing the testimony." On the same subject, see also *Quercia* v. *United States*, 289 U. S. 466, 470. It must be remembered that the inherent error of the charge was magnified because it related to a mistake of law made by the Court. The jury were told that there was one conspiracy and that "you cannot divide it up" (1245). The jury was not at liberty to disregard this statement by the Court because they were specifically charged that they were "in duty bound to accept what I tell you is the law, whether you think it is the law or not, because in this case, at this time in this place it is the law, * * *". The Court went on to tell the jury if they "assumed to interpret the law for yourselves contrary to my instructions, then trouble will ensue, because what I say here goes on the record, *and if I make a mistake I can be corrected*, but the law presumes that you will follow my instructions on the law, and if I instruct you properly on the law and you go out and determine the law contrary to that, and you make a mistake, that mistake can never be corrected, because it is presumed you followed my in-

sructions on the law and nobody would know you did not, and you are bound to follow my instructions on the law". (1256, 1257.) (Italics ours.)

We cannot understand a position which would attempt to impute to the jury a finding contrary to the Court's charge, especially in view of what we have just quoted. The Trial Judge in this case, by his forceful statement of the foregoing, removed the possibility that the jury could have acted, otherwise than according to his instructions, and it seems unjust and unfair for the Government to claim that the jury disregarded the Judge's instructions and required proof far beyond that which he declared was necessary.

E. *Errors and Effect Thereof.*

It is shocking to find that even though all of the foregoing errors were found and conceded in the Circuit Court's opinion, that the judgments of conviction were nevertheless affirmed. This was not the simple case of variance set forth in *Berger* v. *United States* (295 U. S. 78). Here there was a complete denial of justice and the absence of a fair trial according to the constitutional standards. As the record definitely shows, had the Trial Judge found, as the Circuit Court held, that there were "eight, or perhaps more" separate conspiracies, it is likely that he would have dismissed the indictment. If the Court felt that there were "eight or perhaps more" conspiracies, it is reasonable to assume he would have followed the procedure laid down in *United States* v. *Andolschek*, 2nd Circuit (142 F. (2d) 503, 507) where the District Court was advised that "care should of course be taken to confine the evidence of each conspiracy to the conspirators concerned." Certainly, if the Trial Judge had not been mistaken in his impression of the facts, then he would not

have committed the errors of law, and since the verdict of the jury was based upon these presently established errors of law and fact, reason compels a finding that the judgments of conviction should not be permitted to stand. Error having thus been definitely established, there remains for determination the question of whether it can be disregarded, pursuant to the provisions of Section 391 of Title 28, U. S. Code. There are two types of errors. One is technical and the other fundamental. The errors in our case are certainly not merely technical. They affect the very substance and form of a fair trial.

As this Court said in *Bruno* v. *United States*, 308 U. S. 287, 294, Section 391 of Title 28 U. S. Code was "intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." In the *Bruno* case this Court was speaking of an implied direction of Congress concerning the privilege of an accused not to testify. It reversed the judgment of conviction where the error consisted in not charging as requested. In our case, where the error contravenes the express mandate of the constitution—the right to due process of law—(The Fifth Amendment) it would be improper to disregard it. The Act above referred to (Section 391, Title 28 U. S. Code) certainly does not apply here, because the error is not merely technical and touches upon more serious matters than those described in the *Bruno* case as being within the purview of the Act.

Irrespective of whether the error is technical, the fact remains that Section 391 of Title 28 U. S. Code does not change the rule that where substantial rights of a party are affected "especially when [the error is] embodied in the charge to the jury," reversal must follow (*United States* v. *River Rouge Co.*, 269 U. S. 411, 421; *McCandless* v. *United States*, 298 U. S. 342, 347, 348).

This Court in *Bollenbach* v. *United States* (not yet officially reported, No. 41 October, 1945, opinion by Mr. Justice FRANKFURTER, decided January 28th, 1946) treats with a similar error in a Court's charge. The conviction in the BOLLENBACH case was reversed. The prevailing opinion stated: "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts."

The ultimate conclusion drawn by this Court fits our case perfectly. "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." (*United States* v. *Bollenbach, supra.*)

F. *Error in Circuit Court Ruling*

The Circuit Court said that the Trial Judge had instructed "the jury that they must find there was one conspiracy, or that they should acquit all" (1299). This, as we have shown, was error. Direct requests to charge in this very language were refused (1265, Posner's requests Nos. 11 and 12, page 1265. See exceptions at 1259).

Far from authorizing the jury to acquit all of the defendants if the jury found that there was more than one conspiracy, the Trial Judge in effect admonished the jury that there was only one conspiracy in the case, that "you cannot divide it up" (1245, exception taken in this language

1258, 1259) and that the only question which remained for the jury's consideration, was the identity of those involved in that *single conspiracy* (1245).

Assuming that by the charge the jury was left with the task of determining whether one or more conspiracies existed, the dominant fact remains that the very authorization to find that a single conspiracy existed, carried with it the further authorization—under the given circumstances—to convict a defendant upon proof of commission of an overt act in another conspiracy by another defendant. Thus the gravamen of our objection remains constant whether the Trial Judge be deemed to have merely authorized or to have required the jury to find the existence of a single conspiracy.

In order that the situation which existed at the trial with respect to the testimony against other co-defendants become clear to this Court, we shall at this point briefly advert to some of the proof in this connection. There was the existence of a thread of acquaintanceship which led in some complicated sequence from one to another through the roll of persons who dealt with Brown and who were implicated by him in his testimony in individual transactions which tended to predispose the jury to connect all the groups. As a matter of fact, it was so insidious that it misled the Trial Judge into stating that there was only one conspiracy and that "you cannot divide it up" (1245).

Brown first met Lekacos at a cafeteria being introduced by the defendant Mae Seklir (388). The Seklir women in turn had a place of business in the immediate vicinity of the cafeteria operated by Mrs. Vendicos, one of the co-defendants who was acquitted but whose name was brought into the case by Brown and Gerakeris (testimony of Brown, 393). It was in Mrs. Vendicos' cafeteria that Brown met Lekacos through Seklir. It was through Mrs. Vendicos and at her cafeteria that Lekacos met Gera-

keris, and the means of obtaining the Gerakeris loan was discussed (302). Returning to the Seklirs, the record indicates that not only were their loans fraudulent, but that they had assisted Brown in connection with still another fraud, the Slovin loan (402, Government's Exhibit 23, reference to the Lustrite Corp.).

The Misses Seklir had met Brown through David Lapin, one of the co-defendants in this case, who pleaded guilty, and was ultimately sentenced to imprisonment by the trial judge. Lapin had brought "about a dozen" applications to Brown. It was through Lapin that the first Litvin loan was made (416).

The Slovin referred to above was a brother-in-law of Brown's, and it was Brown who had asked Mae Seklir falsely to acknowledge that Slovin worked for the Lustrite Corp. in which Mae Seklir had an interest (402).

Petitioner Kotteakos met Brown through Lekacos, and the first Lekacos loan was made (439). Thereafter, Kotteakos and Brown became very friendly, and, to use Brown's language, Kotteakos took a second loan "for the sole benefit of helping me out" (440, Government's Exhibit 8-D). It was through Kotteakos that Brown met petitioner Regenbogen (450). All this could have no other effect than to predispose the jury to hold each group and every group responsible for the actions of any other group.

II.

The Quantitative Disparity between one conspiracy charged and eight or more proved, in itself constitutes prejudice. (Discussion of questions presented No. 7.)

It is respectfully submitted that the opportunity for confusion and prejudice resulting from a variance between the one conspiracy charged, and those proved, varies directly with the number of conspiracies actually indicated

to have existed. Certainly the fact that this Court decided that the jury probably was not misled by a variance between one conspiracy charged, and two proved (*Berger* v. *United States*, 295 U. S. 78), furnishes neither principle nor authority to sustain a like decision where the variance, as in our case, is the vast one between a single conspiracy charged and a multitude of heterogeneous conspiracies proved.

Is there to be no restriction or limitation upon the privilege of the prosecution to take the greatest diversity and multiplicity of conspiracies, arbitrarily designate them as a single conspiracy, and depend upon this Court's decision in the *Berger* case for sanction? Clearly a point is reached where a jury is first impressed and finally overwhelmed by the very bulk of the inculpatory evidence against a seemingly endless succession of co-defendants. The reasonable doubt that the jury might have entertained of the guilt of a particular individual can hardly be expected to withstand the ever incoming tide of incriminating testimony against the host of defendants, particularly when the jury is admonished that the individual defendant is bound by the acts and declarations of all. Under said circumstances, can it reasonably be expected that a jury will properly allocate the proof when the Court failed to do so? The answer must be in the negative.

When will we reach the ultimate? At what point will the conscience of the Court be shocked, and when will prosecutors be stopped from making it almost impossible for defendants to have their cases reviewed on appeal. In *United States* v. *Berger*, *supra*, there were two conspiracies. In *United States* v. *Liss* (137 F. (2d) 995, cert. den. 320 U. S. 773) there were three conspiracies. In *United States* v. *Cohen* (145 F. (2d) 82) there were likewise three conspiracies. In our case we have leaped to eight or more. At what point will we stop? There must be a limit. A reason

for the procedure approved to date has been that it was economical. This reason itself is at war with our constitutional tenets, and the cost of prosecution is no reason for depriving accused persons of their rights. We assume that another reason is the cost of a retrial. What we have said with regard to the first reason can be repeated here with the same force and effect.

No one can tell what item of evidence ultimately moved a jury to reach a certain conclusion. On the other hand, and far outweighing all of the foregoing reasons for permitting this basically improper procedure, is the effect of the rule on accused persons. An impecunious defendant charged in such a gigantic conspiracy, usually finds himself unable to retain experienced counsel, because it becomes obvious, from a mere examination of the indictment, that the trial of the issues will take a long time. Secondly, in the event of a conviction, appeals to the Circuit Court of Appeals become almost impossible, because many persons, unable to take a pauper's oath, are nevertheless put into the position where they cannot perfect a record and present the questions to the Circuit Court.

Moreover, the magnification of the small conspiracy in which any particular defendant is involved into the fictitious single conspiracy of vast extent, with its far greater potentiality of harm, must necessarily have an inflammatory influence upon the jury. Thus, precedents relating to a variance between a single conspiracy charged and two conspiracies proved and denying prejudicial effect in such cases, do not sanction a variance between a single conspiracy charged and eight or nine proved. The very quantitative difference in the latter case in itself represents substantial prejudice.

III.

The Circuit Court erred in holding (a) that the "Several Conspiracies" could have been joined in one indictment and (b) that several conspiracies with only one member common to all, could properly be joined. (Discussion of questions presented No. 8.)

The conclusion of the Circuit Court that the convictions of the petitioners should stand appears to be grounded upon the statement in its opinion that these several conspiracies with their actual personnel could have been set up as several counts in one indictment despite the fact that only Brown was a member common to all of them (1297). Assuming that our case should be judged by the Law of Joinder and Consolidation as set forth in Title 18, Sections 556-557, the result of the Circuit Court's opinion is to put the Government into a position much stronger than it would have been had the indictment here correctly stated the facts. (See *United States* v. *Perlstein*, 120 F. (2d) 276, *supra*; *Elliott* v. *State*, 26 Ala. 78, cited in *Coco* v. *United States*, 289 Fed. 33, 34.)

The fact, nevertheless, remains that this Court in *McElroy* v. *United States* 164 U. S. 76, 81 said that "while the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the Court to quash the indictment or to compel an election, *such joinder cannot be sustained where the parties are not the same and where the offenses are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them.*" (Emphasis supplied.)

We thus see that only when the parties are identical may counts be joined simply on the ground that the felonies are

of the same nature. Where the parties are different, the evidence constituting proof of guilt must be of the same and not of a different state of facts.

This Court held further in *McElroy* v. *United States, supra*, that the right of trial separate and apart from the trial of others accused of other crimes is a substantial right. "Necessarily, the accused is deprived of a substantial right by the action of the Trial Court, such action having been properly objected to is revisable on error." (164 U. S. at p. 80.)

This Court concluded "It cannot be said in such cases that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions." (at p. 81.)[8]

As authority for the Circuit Court's position *United States* v. *Tuffanelli*, 131 F. (2d) 890, 7th Cir., and other decisions by the Second Circuit are cited.[9]

We respectfully urge, however, that the Circuit Court was mistaken in holding that the Seventh Circuit deems it proper to join different offense of several defendants requiring different proof. In the *Tuffanelli* case, the majority of the Court stated (893-894):

> "District Attorneys, in drafting indictments, ought to keep in mind the admonition of the Courts that it is not good practice to join in an indictment counts charg-

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[8] Rule 8 of the New Rules of Criminal Procedure, particularly subdivision (b) thereof, has been considered by us. It is our opinion that the adoption of the rule in no way modifies this Court's ruling in the McElroy case, supra.

[9] *U. S.* v. *Cohen*, 145 F. (2d) 82, 89; *U. S.* v. *Rosenberg*, 150 F. 2d 788; *U. S.* v. *20th Century Bus Operators*, 101 F. 2d 700; *U. S.* v. *Smith*, 112 F. 2d 83, 85; *U. S.* v. *Liss*, 137 F. 2d, 995, 998.
(All Second Circuit decisions.)

ing different offenses against separate defendants. Todd v. U. S., supra [48 Fed. 2nd 530, 5th Cir.] and Culjak v. U. S., 9th Cir., 53 F. 2nd 554, 82 A. L. R. 480."

We thus see from the *Tuffanelli* case and the cases cited, that the Seventh Circuit, the Fifth Circuit and the Ninth Circuit disapprove of the joinder of different offenses against different defendants, and recognize such rule as firmly established. To the same effect, see also *U. S.* v. *Perlstein*, 120 F. 2d 276, 3rd Cir.; *Gallaghan* v. *U. S.*, 299 F. 172, 174, 8th Cir., and *Castellini* v. *U. S.*, 6th Cir., 64 F. (2d) 636, 637, 638, where the Court cites such elements as the length of the trial, the size of the record, and the fact that only part of the evidence relates to a single charge as reason for enforcing the rule that there should be no such joinder as the Circuit Court has here held would be proper.

Thus, the Circuit Court has erred in its underlying assumption that the case of *McElroy* v. *U. S.*, 164 U. S. 76, 81, with its statement that "joinder cannot be sustained where the parties are not the same," has been overruled or that its authority is not recognized and followed in all other circuits, and particularly by this Court.

IV

Assuming that such joinder (see III) were proper, the Circuit Court erred in holding that the situation created by the variance herein is the same as though there had been such joinder. (Discussion of questions presented No. 9.)

Assuming, however, that it would be proper to have joined the various conspiracies in our case in a single indictment, the fact, nevertheless, remains that the permissibility of such joinder in no event disposes of the root and substance of our argument.

The situation in our case would be the same as in the case of joinder only if at the joint trial the Court had

authorized the jury to convict a defendant of one count upon proof of another. We assume that no Appellate Court would countenance such an instruction. We urge again, that the Trial Court's admonition to the jury that our case represented only a single conspiracy, taken together with the charge that the acts and declarations of one conspirator were binding on all, was tantamount to an instruction that a defendant involved in one conspiracy could be convicted upon the finding that an overt act had been committed by other persons in other conspiracies. Reversal is just as imperative as it would be if corresponding instructions were given in a case of joinder of counts.

Trial under an indictment which charges a single conspiracy, when actually several exist, can hardly be deemed the equivalent, in terms of fairness to the defendant, of a trial under an indictment consisting of a joinder of several counts. In the latter case the demarcation of offenses is shown in accordance with the facts, in the former the indictment is an instrument of camouflage that falls significantly short of the frank disclosure of charges to which the defendant is entitled.

Conclusion

For the foregoing reasons, it is respectfully submitted that the convictions of petitioners should be reversed and the indictment dismissed.

Respectfully submitted,

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